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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OTIS LEWIS HICKMAN, Defendant and Appellant.	H042522 (Monterey County Super. Ct. No. SS121163A)

Defendant Otis Lewis Hickman appeals from the denial of his petition for resentencing under Proposition 47. (Pen. Code, § 1170.18.)[1] Hickman pleaded no contest to 12 counts of commercial burglary. He also admitted a prior conviction for forcible rape—an offense requiring sex offender registration under section 290. The trial court denied his Proposition 47 petition on the ground that the commercial burglary offenses were ineligible for resentencing.

Hickman raises two claims on appeal. First, he contends he is eligible for resentencing because Proposition 47 reduced his commercial burglary convictions to misdemeanor shoplifting under section 459.5. We conclude the trial court did not err by denying Hickman's petition because he admitted a prior conviction for forcible rape, a

[1] Subsequent undesignated statutory references are to the Penal Code.

disqualifying offense under section 1170.18, subdivision (i) (section 1170.18(i)). We will affirm the order denying the petition.

Second, Hickman contends the trial court imposed an unauthorized restitution fine in excess of the $10,000 limit under section 1202.4. We lack jurisdiction over this claim because Hickman failed to file a timely notice of appeal from that order. Accordingly, we will dismiss the appeal as to that claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts of the Offenses*[2]

In June 2012, police stopped Hickman for driving with an expired tag. Hickman smelled of alcohol and unburned marijuana. He admitted drinking alcohol and smoking marijuana earlier in the evening. In a search of the vehicle, police found 33 gift cards, two Visa debit cards, and numerous credit card receipts. Hickman admitted using cloned credit cards to buy gift cards from multiple businesses. In a warrant search of Hickman's home, police found "a complete credit card cloning operation," including two encoding machines, an embossing machine, hundreds of credit card account numbers, hundreds of cloned credit cards, gift card blanks, and credit card receipts for a large number of purchases.

B. *Procedural Background*

The operative charging document alleged 13 counts: Count 1—Unlawful access card activity (§ 484i, subd. (c)); and Counts 2 through 13—Commercial burglary (§ 459). The burglary counts alleged Hickman entered 12 separate commercial establishments in Monterey with the intent to commit larceny. The complaint further alleged Hickman was

[2] Our summary of the facts is based on those set forth in the probation report.

ineligible for a county jail sentence because he had previously been convicted of forcible rape and was required to register as a sex offender under section 290.[3]

In August 2013, Hickman pleaded no contest to all counts as charged. He also admitted the prior conviction for forcible rape. The trial court denied probation and imposed a total sentence of seven years eight months, equal to the upper term of three years on Count 1 with consecutive terms of eight months (one-third the middle term) for each of Counts 2 through 8. As to Counts 9 through 13, the court imposed concurrent two-year terms for each count.

In November 2014, Hickman petitioned for resentencing under Proposition 47 on all 13 counts. The prosecution opposed the petition on the ground that Hickman was ineligible for resentencing because the value of the stolen property exceeded $950. On December 8, 2014, the trial court denied the petition without holding a hearing.

In February 2015, Hickman moved for reconsideration of the denial of his petition. The trial court denied the motion. In June 2015, the trial court vacated its denial of the petition and ordered the matter to be heard by the judge who had initially sentenced Hickman.

On June 25, 2015, the trial court held a hearing on the petition and denied it again. The court cited two grounds for its denial. First, the court found the offenses constituted "a series of crimes that are a continuing course of conduct that amount to over $950." Second, the court found the burglaries did not constitute shoplifting because Hickman entered the stores with the intent to commit fraud.

[3] The complaint alleged defendant had previously been convicted of rape under former subdivision (2) of section 261, subsequently redesignated subdivision (a)(2). (Stats. 1990, ch. 630, § 1, p. 3096.)

II. DISCUSSION

A. *Eligibility for Resentencing Under Proposition 47*

Hickman contends the trial court erred by finding him ineligible for resentencing on the burglary counts because Proposition 47 reclassified those offenses as misdemeanor shoplifting under section 459.5.[4] The Attorney General responds that the appeal is untimely; that Hickman failed to show the offenses constituted shoplifting; and that his prior conviction for forcible rape disqualifies him for resentencing. We conclude the appeal is timely, but that Hickman is ineligible for resentencing based on his prior conviction for forcible rape.

1. *Timeliness of the Appeal*

As an initial matter, we consider the Attorney General's argument that the appeal is untimely. The trial court initially denied the petition for resentencing on December 8, 2014. Hickman filed his notice of appeal on June 26, 2015. The Attorney General contends Hickman exceeded the 60-day deadline to file a notice of appeal under California Rules of Court, rule 8.308. Under that rule, the notice of appeal "must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.308(a).)

However, the Attorney General fails to acknowledge that the trial court vacated its initial order denying the petition. Under rule 8.308, the 60-day deadline runs from the date of the judgment or order from which the appeal is taken. Hickman appealed from the trial court's order of June 25, 2015. He filed his notice of appeal the next day. We conclude the appeal is timely.

2. *Legal Principles Underlying Proposition 47*

In November 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (Act), reducing certain drug- and theft-related offenses to

[4] Hickman does not claim the court erred in denying his petition as to Count 1 (unlawful access card activity).

misdemeanors. Among other things, the Act added section 459.5, defining the misdemeanor offense of shoplifting: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." (§ 459.5, subd. (a).) This court recently held that entering a commercial establishment with the intent to use a stolen credit card to purchase property valued at no more than $950 constitutes shoplifting under section 459.5. (*People v. Garrett* (2016) 248 Cal.App.4th 82, review granted Aug. 24, 2016, S236012.) Section 459.5 mandates that shoplifting shall be punished as a misdemeanor except for persons having a prior conviction for "an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 . . . ." (§ 459.5, subd. (a).)

Proposition 47 also created a new resentencing scheme for persons serving felony sentences for specified offenses made misdemeanors by the Act. (§ 1170.18, subd. (a).) Under the resentencing scheme, a person currently serving a sentence for a felony conviction may petition for recall if the person would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense. However, the resentencing provisions do not apply "to persons who have one or more prior convictions or an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (§ 1170.18, subd. (i).)

3. *Defendant's Prior Conviction for Rape Makes Him Ineligible for Resentencing*

As set forth above, a defendant is not eligible for resentencing under Proposition 47 if he or she has suffered a prior conviction for certain offenses. These include the so-

called "super strike" offenses specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e)(2)(C)(iv) of section 667. That subdivision includes a "serious and/or violent felony conviction, as defined in subdivision (d)" of section 667, for "[a] 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§ 667, subd. (e)(2)(C)(iv)(I).) In turn, section 6600 of the Welfare and Institutions Code defines "[s]exually violent offense" to include, among other things, rape "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury" under section 261. (Welf. & Inst. Code, § 6600, subd. (b); § 261, subd. (a)(2).) Subdivision (d) of section 667 defines a prior serious and/or violent felony conviction to include a prior juvenile adjudication under four conditions set forth in subdivision (d)(3). Furthermore, a defendant is ineligible for resentencing under Proposition 47 if he or she has suffered a prior conviction for an offense requiring registration under subdivision (c) of section 290. (§ 1170.18, subd. (i).) Subdivision (c) of section 290 includes, among other things, forcible rape under subdivision (a)(2) of section 261.

On these grounds, the Attorney General contends Hickman's prior conviction for forcible rape makes him ineligible for resentencing under section 1170.18(i). Defendant contends the prior offense does not constitute a "conviction" under section 1170.18 because it was a juvenile adjudication, not an adult conviction. For this proposition, defendant cites Welfare and Institutions Code section 203: "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." (Welf. & Inst. Code, § 203.)

The Court of Appeal for the Fourth District considered the application of section 1170.18 to juvenile proceedings in *Alejandro N. v. Superior Court of San Diego County* (2015) 238 Cal.App.4th 1209 (*Alejandro N.*). In that case, a juvenile court had declared the minor a ward of the court based on his commission of a commercial burglary. After

the enactment of Proposition 47, the minor argued that his commercial burglary offense had been reduced to a misdemeanor, thereby shortening the maximum period of confinement. In opposition, the prosecution argued that Proposition 47 did not apply to juveniles, such that the minor was not entitled to have his offense reclassified as a misdemeanor. The trial court declined to reclassify the offense as a misdemeanor based on the same argument Hickman presents here: That section 1170.18, by using the term "conviction," applies only to adult offenders.

The court of appeal rejected this argument and held that section 1170.18 applies to juvenile offenders. (*Alejandro N., supra,* 238 Cal.App.4th at p. 1224.) The court acknowledged that juvenile offenders incur adjudications, not criminal "convictions." (*Id.* at p. 1219, citing Welf. & Inst. Code, § 203.) And the court noted that section 1170.18 applies only to a person "currently serving a sentence for a conviction" or who has "completed his or her sentence for a conviction." Although the plain language of section 1170.18 is silent as to juvenile adjudications, the court held that the voters intended to apply Proposition 47 to minors. In doing so, the court necessarily construed the term "conviction" as used in section 1170.18 to include juvenile adjudications.

We agree with the reasoning set forth in *Alejandro N.* Although the court in that case did not specifically consider section 1170.18(i), the normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meaning. (*Department of Revenue of Oregon v. ACF Industries, Inc.* (1994) 510 U.S. 332, 342.) Furthermore, as Hickman acknowledges, subdivision (d)(3) of section 667 defines "a prior conviction of a serious or violent felony" to include a prior juvenile adjudication, provided the adjudication satisfies the four conditions set forth therein. (See § 667, subds. (d)(3)(A)-(d)(3)(D).) Hickman argues that the prosecution failed to show those four conditions were satisfied—e.g., that he was 16 years of age or older when he committed the offense. (§ 667, subd. (d)(3)(A).) But the burden is on the petitioner to make the initial showing of eligibility. (*People v. Sherow* (2015) 239

Cal.App.4th 875.) The record contains no evidence that defendant was under 16 when he committed the rape offense.[5]

Moreover, the disqualifying offenses are not limited to super strikes. Section 1170.18(i) also includes any "offense requiring registration pursuant to subdivision (c) of Section 290." (§ 1170.18(i).) As set forth above, section 290 includes the offense of forcible rape under subdivision (a)(2) of section 261. Hickman argues that, as a juvenile, he could only be required to register under section 290.008, not section 290. However, section 1170.18(i) does not refer to the registration status of the offender or the requirement that he register; it refers to the *offenses* requiring registration. It is indisputable that forcible rape is an offense requiring registration under subdivision (c) of section 290.

Finally, Hickman contends the Attorney General forfeited any argument based on the prior conviction because the prosecution "implicitly conceded" in the trial court that Hickman did not have a disqualifying conviction. For this proposition, he relies on *People v. Smith*. That opinion has since been vacated. (*People v. Smith* (2016) 1 Cal.App.5th 266, review granted Sept. 14, 2016, S236112.)

Here, the prosecution never conceded Hickman was eligible for resentencing. To the contrary, the prosecution opposed the petition by using a standard form with a box checked to indicate Hickman was *not* eligible. Hickman accurately points out that the prosecution relied on grounds other than the prior conviction to contest his eligibility. Nonetheless, Hickman has admitted he suffered a prior conviction for forcible rape. He is bound by that admission. (*People v. Arias* (2015) 240 Cal.App.4th 161, 166, fn. 3.) Remand would serve no purpose as the fact of his admission is not in dispute.

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[5] The complaint alleged Hickman suffered the forcible rape conviction on or about May 4, 1994. The probation report states the court ordered him into custody of the Department of Juvenile Justice on June 16, 1994. Hickman was born on January 12, 1977, making him 17 years old at the time of those events.

For the reasons above, we conclude the trial court did not err in denying Hickman's petition for resentencing.

B. *Restitution Order*

Hickman contends the trial court erroneously ordered restitution in the amount of $25,480, exceeding the statutory limit of $10,000 under section 1202.4. The Attorney General concedes the amount was unauthorized. However, defendant failed to file a timely notice of appeal from that order.

As noted above, California Rules of Court, rule 8.308 provides that the notice of appeal "must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.308(a).) The trial court entered the restitution order when it pronounced sentence on October 1, 2013. Hickman filed his notice of appeal on June 26, 2015, long after the 60-day deadline had expired. Furthermore, his notice of appeal makes no reference to the restitution order or the underlying judgment of conviction. The appeal was taken solely from "the denial of relief and re-sentencing under Proposition 47 on 6/25/2015."

Because we lack appellate jurisdiction over the claim of unauthorized restitution, we must dismiss the appeal as to that claim. (*In re Jordan* (1992) 4 Cal.4th 116, 121.)

III. DISPOSITION

The order denying the petition for resentencing is affirmed. As to the restitution order entered October 1, 2013, that part of the appeal challenging that order is dismissed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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GROVER, J.